IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 17 OF 2003.

M/s. Satpurush Metal Industry,
Represented by its Partner,
Amit Shetgaonkar, o/at F/7,
White Shell, Ansabhat, Mapusa. ... Appellant.

Versus

1. H. Nunes, Near Augustin
   Chapel, Merces, Wadi.
2. State through Public Prosecutor,
   Panaji. ... Respondents.

Mr. A.P. Lawande, Advocate for the Appellant.

Mr. S.D. Lotlikar, Senior Advocate with Miss S. Dessai, Advocate for the Respondent No. 1.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent No. 2/State.

Coram : P.V. HARDAS, J.

Date : 9th October 2003.

ORAL JUDGMENT.

This appeal, at the instance of the original complainant, challenges the acquittal of the respondent no. 1/accused recorded by the Judicial Magistrate, First Class, Mapusa, by Judgment, dated 26th November 2002, in Criminal Case (Other Act) No. 117/1997/A, for an offence punishable under Section 138 of the Negotiable Instruments Act.

2. The facts in brief, as are necessary for the decision of the appeal, are stated hereunder:-

The appellant filed the aforesaid complaint

case for an offence punishable under Section 138 of the Negotiable Instruments Act alleging therein that the respondent no. 1/accused had requested the complainant company to supply black stone metal and, accordingly, the complainant had supplied the metal and the accused had issued a cheque, bearing No. 0241919, drawn on the Union Bank of India, Panaji. The cheque, when presented for payment, was returned unpaid by the Mapusa Urban Co-operative Bank, on 25th September 1997, on account of insufficiency of funds. The complainant, thereafter, issued a notice, dated 9th October 1997, calling upon the accused to make the payment within 15 days and, since the accused failed to make the payment within 15 days, the complainant filed the aforesaid complaint.

3. The learned Judicial Magistrate, First Class, Mapusa, explained the particulars of the offence. The accused pleaded not guilty and claimed to be tried. The complainant in support of its case examined Amit Shetgaonkar as P.W.1.. The accused in his defence examined Ratnakar Kurtarkar as D.W.1, Ramnath Shetgaonkar as D.W.2, Raul Sequeira as D.W.3 and Pandurang Kubal as D.W.4. The learned trial Court dismissed the complaint on the grounds (1) that the complainant was informed by memorandum, dated 9th September 1997 about the dishonour of the cheque and, therefore, the contention of the complainant that he had

received the said intimation, on 25th September 1997, could not be believed and (2) according to the evidence on record, after the bouncing of the cheque, the accused had given a bearer cheque for Rs. 1,20,000/-, which was encashed by the complainant and, as the complainant had failed to prove that, apart from the debt of Rs. 1,20,000/-, there was another debt which was outstanding, the accused was given the benefit of doubt.

4. P.W.1 Amit Shetgaonkar states that the complainant company is a partnership firm. P.W.1 Amit further states that in the month of January 1997 black stone metal worth Rs. 4,15,000/- was supplied to the accused. The accused towards discharge of the debt had issued a cheque for Rs. 1,20,000/- drawn on the Union Bank of India. The said cheque was presented at the Mapusa Urban Co-operative Bank, Mapusa, where the complainant has his account. The said cheque was returned with the memorandum of the Mapusa Urban Co-operative Bank intimating the return of the cheque on account of insufficiency of funds. The cheque is at Exhibit P.W.1/B and the two memoranda of the Bank are at Exhibit P.W.1/C Colly. A notice, dated 9th October 1997, was served on the accused and the postal receipt and the acknowledgement is at Exhibit P.W.1/D Colly. The intimation of the Mapusa Urban Co-operative Bank regarding the dishonour of the cheque is at Exhibit

P.W.1/E. According to P.W.1 Amit, the Mapusa Urban Co-operative Bank had informed the complainant company on 25th September 1997 that the cheque had been dishonoured. P.W.1 Amit in his examination-in-chief has stated that, on 7th November 1997, the complainant had received a reply from the accused that the complainant had received the cheque amount of Rs. 1,20,000/-. In the cross-examination P.W.1 Amit has admitted that, apart from the transaction of supplying the black stone metal, there was no other transaction between the complainant and the accused. According to him, black stone metal worth Rs. 4,15,000/- was supplied, out of which the accused had issued a cheque for Rs. 1,20,000/-, which had bounced. He states that from the balance amount of Rs. 2,95,000/-, the accused had paid some amount to the complainant, but, he was not able to tell the exact amount paid by the accused. In the further cross-examination he has admitted that the accused had paid the balance amount of Rs. 2,95,000/- from out of Rs. 4,15,000/- and the present complaint had been filed in case of the bouncing of the cheque of Rs. 1,20,000/-. He has further admitted that he has not made any reference in the complaint in respect of the outstanding amount from the accused. He has denied as false that, on 5th September 1997, a bearer cheque had been issued towards the discharge of the liability of Rs. 1,20,000/- in respect of the cheque which had

bounced. He also denied the suggestion that the bearer cheque had been issued at the request of the complainant as it would have taken some time for clearance of the account payee cheque. He has stated that he had gone to the bank for encashing the cheque. To the suggestion that it was his brother Ramnath, who had collected the amount, he states that he does not know whether Ramnath had collected the amount or not. He has stated that the cheque was first presented before the Bank on 4th September 1997 itself. For the first time the cheque was dishonoured for want of funds and on the second occasion the cheque was dishonoured as the payment was stopped by the drawer. He denied the suggestion that since they had received Rs. 1,20,000/- by bearer cheque, the accused had stopped the payment of the account payee cheque. He has also admitted that, when the cheque bounced for the first time on 4th September 1997, he had informed the accused about it on 5th September 1997. According to him, the accused had asked him to present it again. In the cross-examination he has further stated that both the cheques, that is, the cheque which had bounced as well as the bearer cheque were given by the accused on 4th September 1997 itself at his residence. He has admitted that he had issued bills to the accused towards the purchase of items worth Rs. 4,15,000/-.

5. Perusal of the memorandum of the Bank of the accused, dated 4th September 1997, would reveal that the cheque was returned with an endorsement 'to present it on the next day'. By memorandum, dated 8th September 1997, the cheque was returned with the endorsement 'payment stopped by the drawer' when the cheque was presented again. The memorandum, at Exhibit P.W.1/E, is the memorandum issued by the Bank of the complainant. The said memorandum is dated 9th September 1997. It is an admitted fact that a bearer cheque came to be issued on 5th September 1997, which was encashed by the complainant on 8th September 1997.

6. The presumption which would arise in respect of the aforesaid cheque is that the accused was indebted to the complainant towards the value of the cheque, namely, Rs. 1,20,000/-. The cheque was initially presented on 4th September 1997, which had bounced, and, according to P.W.1 Amit, an intimation in this regard was given to the accused. The defence of the accused is that the complainant had requested for issuing a bearer cheque as the encashment of the bounced cheque would take some time and, accordingly, he had issued the bearer cheque. The complainant has not placed on record the bills towards the alleged sale of metal worth Rs. 4,15,000/-. In that background, therefore, the learned trial Court has held that the complainant has failed to

prove that there were other outstandings, apart from the cheque of Rs. 1,20,000/-, which had bounced.

7. The complainant had been informed by his Bank by memorandum, at Exhibit P.W.1/E, dated 9th September 1997, regarding the bouncing of the cheque. According to the complainant, he had been informed by the Bank on 25th September 1997 and had, accordingly, issued the notice within 15 days. Apart from the bald statement of the complainant that he had been informed on 25th September 1997 by his Bank, there is no other evidence on record. The memorandum is dated 9th September 1997 and it is inexplicable as to why the Bank took nearly 16 days in informing the complainant. In the facts of the present case, according to me, therefore, it was incumbent upon the complainant to have examined the Officials of the Mapusa Urban Co-operative Bank to establish that he was informed on 25th September 1997 in respect of the memorandum, dated 9th September 1997. The learned trial Court has, accordingly, not accepted the evidence of the complainant in this behalf that he was informed by the Bank on 25th September 1997 and had, accordingly, dismissed the complaint as beyond the period of limitation.

8. I have heard Mr. Lawande, the learned counsel appearing for the complainant and Mr. Lotlikar, learned

counsel appearing for the respondent no. 1/accused. According to me, the view taken by the learned trial Court is a possible view on the basis of the evidence on record. There is no perversity in the reasoning of the learned trial Court to warrant interference in an appeal against acquittal. The appeal is, therefore, devoid of substance and the same is dismissed.

(P.V. HARDAS)
JUDGE.

ed's.